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# VOLUNTEERS . . . NOT PROFITEERS: THE *HYDROLEVEL* MYTH

*William J. Curran III\**

The recent *Hydrolevel* Supreme Court decision<sup>1</sup> has generated considerable notoriety in the national press<sup>2</sup> and concern in the business community.<sup>3</sup> Observers do not understand how the American Society of Mechanical Engineers ("ASME") could have injured the Hydrolevel Corporation by a surreptitious conspiracy between two corporate ASME volunteers, seemingly beyond its control. The Court made clear, however, that a conspiracy to misinterpret an ASME product standard by ASME volunteers was under ASME's auspices, and thus under its direct control. ASME should not have permitted the rival corporate volunteers to judge Hydrolevel's product qualifications and should have prevented the fraudulent interpretation. Its failure to control conflicts of interest and spurious interpretations created a dangerous antitrust climate for which the Court found ASME liable.

The Court's view of ASME's failure to take "systematic steps to make improper conduct . . . unlikely . . . [and thus to] prevent antitrust violations"<sup>4</sup> has created difficult problems for the nation's many standards-setting organizations. Engineering, professional, and trade organizations must now guard against the crippling threat of antitrust treble damage liability by devising controls against conspiratorial conduct. This article will explain that because the antitrust law of standards is anomalous, effective

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1. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

2. Johnson, *Liability in Setting Standards*, N.Y. Times, June 1, 1982, at D1, col. 4; Barbash, *Professional, Trade Group Liability Rises*, Wash. Post, May 18, 1982, at D6, col. 3; Wermiel, *Engineer Groups Are Dealt Blow By High Court*, Wall St. J., May 18, 1982, at 2, col. 2.

3. Gilbert, *Hydrolevel versus ASME*, AUTOMOTIVE ENGINEERING, Aug. 1982, at 20; American National Standards Institute, *Implications of the Supreme Court Decision in the Hydrolevel Case*, (undated) (circulated to membership); American Society for Testing and Materials, Letter to Membership (May 24, 1982) (regarding the *Hydrolevel* decision); American Society of Mechanical Engineers, Supreme Court Holds ASME Liable in *Hydrolevel* Case (May 18, 1982) (news release).

4. *Hydrolevel*, 456 U.S. at 572-73.

control is impossible. Furthermore, this article will discuss the Court's new "altruistic" solution to "old" Sherman Act problems.

### I. THE *HYDROLEVEL* DECISION

The American Society of Mechanical Engineers ("ASME") is a professional society of 9,000 members with both a full-time and a volunteer part-time staff responsible for drafting hundreds of engineering standards used by industry and adopted in a score of federal, state, and municipal safety regulations. ASME assigned the task of drafting, revising, and interpreting one of its standards, the prominent boiler and pressure vessel code, to a committee which delegated public inquiries to a subcommittee under vice-chairman John W. James, an employee of Hydrolevel's chief rival. The boiler code, over 18,000 pages in length, is used by 46 states and Canada and annually generates 20,000 to 30,000 public inquiries.<sup>5</sup>

Mr. James testified years later, before a United States Senate investigation, that he and his volunteer committee chairman wrote to ASME under an assumed name, inquiring whether Hydrolevel met the code's requirements. The letter, cleverly written to elicit a negative interpretation, was routinely routed by ASME's staff to the chairman, who wrote for its Secretary a reply condemning products like those produced by Hydrolevel.

Hydrolevel later sued under sections 1 and 2 of the Sherman Act,<sup>6</sup> alleging that the ASME boiler committee, and the employers of the two committee officials, conspired to misinterpret the code. ASME refused to settle and lost the case at the trial stage. The trial judge instructed the jury, pursuant to an ASME request, that ASME could not be liable unless it ratified the conspirators' actions. ASME appealed to the United States Court of Appeals for the Second Circuit<sup>7</sup> which remanded on damages, but affirmed liability on the basis that the conspirators acted within their apparent authority, notwithstanding the fact that ASME never ratified nor materially benefited. ASME then sought and was granted Supreme Court review.

The Court, by a 6 to 3 vote, affirmed apparent authority liability, with Chief Justice Burger affirming on actual ratification grounds. Justice Blackmun, for the majority, found general agency liability "when . . . agents act with apparent authority and commit torts analogous to the anti-

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5. *Id.* at 559, 579.

6. 15 U.S.C. §§ 1, 2 (1982).

7. *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118 (2d Cir. 1980).

trust violation presented by this case.”<sup>8</sup> He affirmed ASME’s liability for not having stopped the conspirators:

Only ASME can take systematic steps to make improper conduct on the part of its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violation.<sup>9</sup>

The dissent disagreed: “application of . . . expansive rules of liability in . . . antitrust treble damages . . . threatens serious injustice and overdeterrence.”<sup>10</sup>

## II. CONFLICT AND CONFUSION

There are a number of anomalies in *Hydrolevel*, reflecting the paradox of standards themselves.<sup>11</sup> Are standards private or public? Are they competitive or anticompetitive? Are they controllable under the antitrust laws? The Supreme Court answered that standards can be developed by corporate volunteers, motivated altruistically, not competitively;<sup>12</sup> that standards-setting organizations can control surreptitious ASME-like conduct, enforcing cooperation among competitors in the public’s interest;<sup>13</sup> and that standards-setting, although important, can be relegated to the marketplace under Sherman Act controls.<sup>14</sup>

To further illustrate the nature of these questions, consider the example of education. Education has both private and public characteristics. It is provided both competitively and publicly, and is controlled by our system of laws. Education’s cultural, scientific and technological benefits are pub-

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8. *Hydrolevel*, 456 U.S. at 565-55 (citations omitted).

9. *Id.* at 572-73 (citation omitted).

10. *Id.* at 593 (Powell, J., dissenting).

11. The term “standards” (i.e., industrial standards) is generally used in this article to include the terms “standardization,” “certification,” and “simplification.” Standardization usually refers to the manufacturing of uniform or identical products according to a common design or “standard.” Certification is the testing of products to determine their conformance with a standard. Simplification is the elimination of product types or varieties according to a standard. For further discussion of standards and their usage, see R. LEGGERT, STANDARDS IN CANADA (1974); L. VERMAN, STANDARDIZATION (1973); NATIONAL INDUSTRIAL CONFERENCE BOARD, INDUSTRIAL STANDARDIZATION No. 85 (1957); NATIONAL STANDARDS IN A MODERN ECONOMY (D. Reck ed. 1956); J. PERRY, THE STORY OF STANDARDS (1955); B. MELNITSKY, PROFITING FROM INDUSTRIAL STANDARDIZATION (1953).

12. *Hydrolevel*, 456 U.S. at 571.

13. *Id.* at 572.

14. *Id.* at 570.

lic, freely available and not subject to private control. Yet the personal benefits of education—higher income, advanced social standing, and enhanced personal esteem—are subject to private control. If the private benefit is distinguishable from the public benefit, the former will be provided by the market under competitive controls and the latter will be provided by the government. As in education, the standards in *Hydrolevel* are mixed with both private and public characteristics benefitting industry and affecting society. Here also, the public policy objective is to separate the private from the public, with the former under antitrust controls and the latter under government regulation.

Most standards today, however, are provided and controlled privately, through organizational procedures that inevitably restrict membership, boycott minority opposition, and inflate prices through reduced product competition.<sup>15</sup> Society thus faces a difficult choice between standards provided privately through deficient internal controls and standards provided publicly by an enlarged bureaucracy.<sup>16</sup>

Although the Court stopped short of making any sweeping statements about standards,<sup>17</sup> it did place altruistic Sherman Act controls on standards as if they were private. Yet, the Supreme Court also recognized that volunteers "affect the destinies of businesses."<sup>18</sup> The Court noted that "less altruistic"<sup>19</sup> volunteers may harm competitors "through the manipulation of . . . codes"<sup>20</sup> and therefore may even "frustrate competition."<sup>21</sup> But altruism is a surprising legal standard because it conflicts with the Court's past rulings and with what business would view as practical.

15. See D. Turner, *Antitrust Aspects of Industry Cooperation and Product Standardization*, address delivered before the Briefing Conference on Fair Packaging and Labeling Act of 1966 (May 26, 1967); D. Turner, *Consumer Protection by Private Joint Action*, address delivered before the Annual Meeting of the New York State Bar (Jan. 26, 1967), reprinted in N.Y. STATE BAR ASS'N, *ANTITRUST LAW SYMPOSIUM* 36-46 (CCH) (1967); D. Turner, *Competition Among Competitors*, address delivered before the Fifth Annual Corporate Counsel Institute (Oct. 13, 1966).

16. See Curran, *Industrial Standards, Antitrust and the Logic of Public Action: An Historical Search for a Rational Public Policy*, 17 DUQ. L. REV. 717 (1978-79).

17. The Supreme Court, in this regard, did state that

We need not delineate today the outer boundaries of the antitrust liability of standard-setting organizations for the actions of their agents committed with apparent authority. . . . And in this case, we do not face a challenge to a good faith interpretation of an ASME code reasonably supported by health or safety considerations.

*Hydrolevel*, 456 U.S. at 577.

18. *Id.* at 571.

19. *Id.*

20. *Id.*

21. *Id.*

In the past, the Court has interpreted the Sherman Act as disallowing conduct which is deemed "unreasonable" in the light of experience.<sup>22</sup> Since the 1912 *Standard Sanitary* decision,<sup>23</sup> standards may not be used to exclude a nonstandard product in order to help fix a standard product's price, and the Court consistently found standards illegal if used either to fix prices or to boycott competitors.<sup>24</sup> Although waivering in the 1925 *Maple Flooring* decision,<sup>25</sup> the Court has never deviated from its original antipathy toward anticompetitive standards. In the 1961 *Radiant Burners* decision,<sup>26</sup> the Court struck down a standards-setting conspiracy of manufacturers and users for boycotting a noncertified product. Unsurprisingly, the Court ruled most recently in *Hydrolevel* as it has ruled historically, against a conspiracy between a standards group and its members. However, the Court's controlling legal standard, altruism, is obviously antithet-

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22. The Supreme Court, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), held that in order to be lawful agreements must only be "reasonable" under the Sherman Act, reflecting the common law belief that encouragement of industry is in the public interest. Later, in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), the Court defined this "Rule-of-Reason" analysis to include:

[W]hether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to interpret facts and to predict consequences.

*Id.* at 238.

23. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912).

24. *See United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

25. In *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 566 (1925), the Supreme Court noted: "The defendants have engaged in many activities to which no exception is taken by the Government and which are admittedly beneficial to the industry and to consumers; such as co-operative advertising and the standardization and improvement of the product."

26. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). This decision protects the right of consumers to obtain the degree of product quality they choose, rather than having that decision made for them through the unilateral agreement of producers. A congressional subcommittee noted:

The case of *Radiant Burners, Inc. v. Peoples Gaslight and Coke Company* . . . held . . . a standard may not properly be used to exclude a serviceable but non-deluxe product from the marketplace by requiring that all the manufacturers of a given product conform to needlessly high standards. The right of the consumer to obtain less by paying less is basic.

HOUSE SELECT COMM. ON SMALL BUSINESS, THE EFFECT UPON SMALL BUSINESS OF VOLUNTARY INDUSTRIAL STANDARDS, H.R. REP. NO. 1981, 90th Cong., 2d Sess. 53 (1968) at 77.

ical with competition.<sup>27</sup>

Altruism is an impractical guide to competitive Sherman Act behavior, and as a result, will reduce confidence and certainty in the law. Because the altruism standard conflicts with established market incentives, it also will confuse standards-setting organizations. The standards process, as all market processes, must be used by business for financial gain. A business simply cannot afford to sublimate its profit needs, to ignore its natural competitive instincts, and to loan volunteers without regard to these fundamental commercial needs. Thus, neither employers nor their volunteers can meet the Court's historic competitive imperative and simultaneously develop noncompetitive standards cooperatively for all society. It is unclear whether corporations and volunteers can deny commercial realities. Nevertheless, since *Hydrolevel* they must attempt to serve the public selflessly in accord with the Court's new awareness of the "opportunities for anticompetitive activity."<sup>28</sup>

Contrary to the Court's view, altruistic controls are not the answer. Because the Court has never condoned anticompetitive standards, appearances of due care and propriety—even if controls are illusory—are now very important.

### III. ANTITRUST CONTROLS

Because standards impact upon all society, they affect markets and prices. As a result, standards are inevitably anticompetitive and can be illegal.<sup>29</sup> Since the antitrust laws govern private conduct, they cannot wholly eliminate these public effects, visible to a skilled antitrust investigator who need only analyze markets and prices and interview frustrated competitors.<sup>30</sup> If uncovered, anticompetitive effects cannot be explained as "reasonably" ancillary to a lawful health or safety purpose, since the Court ruled in *Professional Engineers* that competition may not be restrained to abate a public safety nuisance.<sup>31</sup> But without a health or safety objective,

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27. See generally T. NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

28. *Hydrolevel*, 456 U.S. at 571.

29. The antitrust implications of standards are discussed in few scholarly reviews. The few, beside those cited in *supra* notes 15 & 16, include: Timberlake, *Standardization and Simplification Under the Anti-trust Laws*, 29 CORNELL L.Q. 301 (1944); Wachtel, *Product Standards and Certification Programs*, 13 ANTITRUST BULL. 1 (1968); Blecher, *Product Standards and Certification Programs*, 46 BROOKLYN L. REV. 223 (1980).

30. See generally Hummel, *Antitrust Problems of Industry Codes of Advertising, Standardization, and Seals of Approval*, 13 ANTITRUST BULL. 607, 610-14 (1968).

31. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978). Justice Stevens noted therein:

Exceptions to the Sherman Act for potentially dangerous goods and services would

a standard's purpose becomes strictly commercial. Altruism, therefore, requires something more than a high-minded social objective or a punctilious due process record.

Due process, whether procedural or substantive,<sup>32</sup> cannot remedy the deficiencies detected by the Court in *Hydrolevel*. Although it does limit competitive foreclosure, a due process format of notice, consultation, public debate, voting, and appeals stifles dissent with majority commercial interests dominating oppositional interests. An altruistic solution to the due process conundrum would be a rule, not majoritarian, with single dissenting interests controlling. Obviously diluting standards, a rule of unanimity<sup>33</sup> would, however, eliminate most exclusion, so long as all interested public and private parties were represented. Even then, substantively correct standards will affect product performance and deter future technical improvement, delaying research and development. Corporations producing a standardized product will have no incentive to research ways around the rule, rendering it obsolete. Their adherence to the standard will raise antitrust issues over the future loss of competition for innovative and improved products. The only altruistic control against subverted research would be a public monitor of all scientific and technological developments. However, since industrial research is private and conducted secretly, it would have to be made public, exposing technical achievements, and creating an additional Sherman Act risk by distorting the race for a better product.

Certifying a product's qualities is also troublesome.<sup>34</sup> A certification is

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be tantamount to repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against harm by conferring monopoly privileges on the manufacturers.

*Id.* at 695-96.

32. Courts, applying the Rule-of-Reason discussed *supra* note 22, to associations promulgating standards, have approved association decisions that comply with basic requirements of procedural and substantive fairness. *See, e.g.,* *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (en banc); *Gunter Harz Sports v. Tennis Ass'n*, 665 F.2d 222 (8th Cir. 1981); *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126 (6th Cir. 1980); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977);. *See also* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966); L. SULLIVAN, ANTITRUST 247-53 (1977).

33. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

34. *See generally* Hoffman, *Industry-Wide Codes, Advertising, Seals of Approval and Standards: As Participated in by the Trade Association*, 13 ANTITRUST BULL. 595 (1968); Hummell, *supra* note 30. *But see* Howe & Badger, *The Antitrust Challenge to Nonprofit Certification Organizations*, 60 WASH. U.L.Q. 357 (1982).



believed safe if voluntary, without mandatory features. As a practical matter, compliance with a certification program can become mandatory over time as participants cease production of similar but noncertifiable products, thereby choking off cheaper products and those denied certification. Moreover, laboratories testing for certification are not always independent, test results are not always confidential, and competitors managing the program are not always denied access to records.<sup>35</sup> In the long run, a laboratory's effectiveness may be determined by the number of products denied certification, not by whether it administered a certification program objectively and fairly. In addition, because procedural costs are borne by the certified members, they will continue the program only if commercially (and competitively) successful. Thus, every refusal to certify will have difficult competitive implications, possibly raising inferences of "bad intent" as in *Structural Laminates*.<sup>36</sup> Even if altruistic controls and tests could be devised, reconsideration must be offered a product which fails, as well as full appeal rights and access to equivalent tests. Obviously, such altruism would be alien to a rigidly scientific test, but not to a test accommodating new products immediately eligible for certification. Once certified, they may not influence the program's future scientific design and the eligibility of successive generations of products. Can a certification program be designed which is totally voluntary, nonmandatory and actually open to every product?

Altruistic controls are obviously impractical. Nonetheless, organizations have little choice but to approximate the controls envisioned by the Court, adopting more stringent management systems and more rigorous due process procedures. Typically, organizations will attempt to control those who may act on their behalf. They will dictate who has the authority to sign letters and distribute materials, who are their policymaking officials

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35. The problem with testing a laboratory's independence is illustrated by Howe & Badger:

Over one thousand private sector laboratories perform testing and services related to certification. Many of the laboratories are affiliated with third-party certification programs sponsored and administered by nonprofit certification organizations or trade associations, often with public interest representatives. In addition, numerous inhouse manufacturers' laboratories, as well as nonprofit entities such as Underwriters Laboratories and various commercial entities, also engage in certification testing. Those resulting types of certification, however, lead to representations of certification status either by the manufacturers without the involvement of industry-wide, third-party administrative bodies or by the laboratories rather than the manufacturers.

Howe & Badger, *supra* note 34, at 397-98.

36. *Structural Laminates Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

and what are their policy procedures, what are their members' authority limits and antitrust obligations and who has access to official letterhead and can make *ad hoc* advisory and interpretive opinions. Organizations heeding the Court's admonition that "antitrust violations . . . could not have occurred without . . . AMSE's method of administ[r]ation,"<sup>37</sup> will disseminate mandatory membership directives prohibiting conflicts of interest and delineating responsibilities and obligations and control members' access to organizational resources in order to limit misconduct.

Organizations will dutifully investigate antitrust infractions vigorously and not "whitewash" inappropriate conduct as a courtesy to a committee officer as in *Hydrolevel*.<sup>38</sup> Such controls will improve the detection probability of misconduct and will eliminate invidious conspiracies. Additionally, future litigation will be avoided by balancing committees with both private and public representatives, not unbalancing them with partisan industry officials, and by requiring full committee approval of all interpretations. Organizations will attempt what the Court directed: that volunteers not be cloaked with expedient authority, and that private interests not conflict with the public interest.

Yet skulduggery will occur even in closely controlled organizations.<sup>39</sup> Practically speaking, no organization can control shrewd members intent upon competitive sabotage because the opportunities for clandestine conduct are too great.<sup>40</sup> Corporations advisedly select employees as volunteers from engineering, health, and safety and not from sales and marketing. This simple precaution, like other customary controls, may or may not eliminate misconduct depending on corporate management's cost consciousness. Nonsales personnel may have to compromise their professionalism in order to achieve cost-effectiveness, thereby interjecting potentially dangerous commercial considerations into a standard's development. And if professionals do not participate directly, avoiding both meetings and voting, they will still be vulnerable as would be their corporate employers. Risks cannot be eliminated by simply eschewing roll-calls, and by relying on secondhand minutes and "discrete" phone reports. The degree of participation does not guarantee a propitious legal outcome because

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37. *Hydrolevel*, 456 U.S. at 576.

38. *Id.* at 572.

39. See generally Lane, *Trade and Professional Associations: Ethics and Standards*, 46 ABA ANTITRUST L. J. 653 (1978).

40. ASME knows the practical problems of controlling anticompetitive behavior based on a 1970 Justice Department action for refusing to inspect and certify foreign-manufactured boilers. ASME discontinued the practice and agreed with the Department to inspect all boilers regardless of origin. *United States v. American Soc'y of Mechanical Eng'rs, Inc.*, No. 70 Civ. 3141 (S.D.N.Y. Sept. 11, 1972); 1972 Trade Cas. (CCH) ¶ 74,028 at 92,256.

even nominal participation can be dangerous. However, corporations can participate safely in federally sponsored and mandated programs.<sup>41</sup> If actually compelled, participation can be immune from antitrust attack; but participants should not abuse the legislative, judicial or regulatory processes of the government for anticompetitive ends.<sup>42</sup>

Of course, corporate counsel will attempt to counter opportunities for felonious conduct by reviewing the organization, by scrutinizing its charter, by-laws and statement of goals and purposes, by insisting on strong antitrust and strict due process policies and by determining the organization's commitment to technical excellence and procedural integrity. But even these precautions are worth little if counsel fails routinely to review each standard's purpose and objective. Since standards are competitively sensitive, counsel should require justification for them at each stage of development from initial formulation to implementation and ultimately through interpretation. Each stage must stand alone and be able to withstand separate close scrutiny. If counsel's analysis reveals flaws, an organization cannot be absolved of antitrust responsibility because of its part-time staff's "volunteer" status or its own "non-profit" charter. Whether utilizing volunteers, or chartered nonprofit organization, an organization developing an industrial standard immediately loses all prospect of antitrust immunity.<sup>43</sup>

Some obvious misconduct can be thwarted by traditional antitrust measures including strict due process procedures. However, these customary controls, even if strengthened, do not guarantee altruistic conduct. Organizations, through new controls, must actually change their character, not merely watch the development, usage, and interpretation of standards more closely. Organizations must depend less on corporate volunteers.

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41. It should be noted that participation in nonmandated government standards would not immunize private parties from the antitrust laws. Recent Supreme Court decisions, such as *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); and *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773 (1975) have reaffirmed this principle established earlier by the Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) and *Federal Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67 (1934). See generally Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEXAS L. REV. 1329 (1978).

42. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

43. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (upholding a Sherman Act complaint against a professional engineering society); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (upholding a Sherman Act complaint against the American Gas Association); *Associated Press v. United States*, 326 U.S. 1 (1945) (upholding a Sherman Act complaint against a nonprofit membership association).

They cannot allow the volunteer to manage committees and must relegate them to technical research. Organizations will not likely change their individualistic character and become purely altruistic, but less drastic changes will only diminish, not eliminate, the risk of antitrust liability arising from corporate volunteer management.

Thus limiting private participation will not eliminate antitrust risks proportionately. Conniving volunteers can still work minor escapades, though now relegated to "technical" research. Indeed, research may be more important, and more sensitive, than the management of committees. Undoubtedly, full-time managers can be fooled technically, not having the range of scientific expertise of volunteers working in the field. Moreover, major social damage can occur as corporations importune organizations to develop standards, even if based on solid technical data, hoping to achieve anticompetitive results. If such standards are adopted, it is possible that the law will be violated by the corporations either in concert with the organization or by the corporations only. But what about an unwitting organization? Was not ASME unwitting, although careless? Since the *Hydrolevel* decision, dare any organization insulate itself with anything less than safeguards against casual business alliances?

If organizations must change their character and identity substantially, perhaps the renunciation of all corporate influence is the answer. As a practical matter, there are few alternative private organizations: only independent foundations and academic organizations come to mind. Either could theoretically develop standards without *Hydrolevel* complications, but probably not as efficiently as with corporate financial backing. But is a plethora of privately financed organizations churning out standards a rational social goal?

#### IV. SIGNIFICANCE

This brings us to an important point: the eminent practicality of internal corporate standards. It is difficult to envisage circumstances that an internal corporate program could not handle. It is equally difficult since *Hydrolevel* to understand why a corporation sensitive to escalating legal costs and increasing liability, would not cut industrial standards from its budget and devise its own safety and quality programs at a fraction of the cost. If there were overriding commercial considerations, a corporation could still "jawbone" publicly outside the typical standards forum. Addressing the public directly, the corporation is doing nothing more than promoting a recommended course of action which society, industry and users could then accept or reject.

This is the market system at its best—society, users, and customers signalling their preferences to producers—and absolutely antitrust clean unless, of course, the producers signal each other directly. A producer must accept the market's decision as final, not seek a competitive response before initiating a product or process modification. In the past, producers may have used the standards system to achieve competitive parity or a cost equilibrium, but it would not be prudent for them to use standards as an indirect way to coordinate industrial action. As a general rule, if a producer has a superior product, or cost-efficient process, it should exploit its advantage rather than raise antitrust concerns by "helping" its industry. Yet, was competition in this time-tested "classical" sense rejected by the Court in *Hydrolevel*?

Historically, the Court has extolled "hard" Sherman Act competition between antagonistic business interests in order to further the public's interests.<sup>44</sup> Does altruism, therefore, signal a departure from the past? Has the Court modified the nineteenth century Sherman Act to solve contemporary economic problems, requiring cooperation rather than old-line competitive solutions? Could this be the reason for the controversy?

Traditionally, business (and the Court) has rejected collective solutions on ideological "free enterprise" grounds. However, there is historical precedent for a collective effort in the form of an independent commission financed publicly and comprised of existing standards organizations, tightly controlled without autonomous authority. The nation's War Industries Boards eliminated duplicate and unnecessary goods and equipment during both World Wars, preserving essentials for the nation's defense.<sup>45</sup> Of course the times were different, but the concept and potential accomplishments of a collective and unified effort would be no less valid or tan-

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44. The Supreme Court's classic statement on competition and the Sherman Act is succinctly stated in *Northern Pac. R.R. v. United States*, 356 U.S. 1, 4-5 (1958):

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.

*Id.* (quoting *Chicago Bd of Trade v. United States*, 246 U.S. 231 (1918) and *Standard Oil Co v. United States*, 221 U.S. 1 (1911)).

45. See R. CUFF, *THE WAR INDUSTRIES BOARD* (1973).

gible today. Whatever the final form and structure, present organizations will necessarily change. They will exercise greater hierarchical control and affect the quantity and quality of standards, as well as their interpretation and certification. The point is not whether change will come, but whether the social and legal demands for change can be anticipated so that a transformation can evolve smoothly. Perhaps the Supreme Court understands the need for slowly evolving change and *Hydrolevel* is its first signal.

Accordingly, standards-setting organizations might well consider a planned approach, bringing together industry, government, and labor<sup>46</sup> to standardize products and processes with little to fear from traditional antitrust. The Court in *Hydrolevel* has provocatively set forth a possible thesis for solving economic problems intractable under the old ways and methods of thinking.

This is not to say that a "new thesis" will pervade other antitrust areas in the future, but the possibilities for change do exist. Better coordination between producers and distributors is a distinct possibility.<sup>47</sup> Coordinated joint research ventures and export amalgamations are already realities, and a global economic model may possibly eclipse the "perfectly" competitive model of a bygone era. Indeed, the Court has already hinted at a new, more realistic world economic model,<sup>48</sup> but in other recent decisions<sup>49</sup> has preserved older competitive rules making compliance difficult. Inconsistencies will evaporate over time as *Hydrolevel's* new, coordinated antitrust approach becomes either a blueprint for the nation's economic future or an aberration. Perhaps though, it signals more fundamental change.

## V. RESOLUTION

The complexity of *Hydrolevel* reflects the remarkably varied history of industrial standards; now a history of approximately 400 private organizations and 20,000 standards.<sup>50</sup> Depending upon your perspective, these large numbers are either a tribute to the nation's economic vitality, strength and diversity or a condemnation of it for never unifying standards

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46. See R. REICH, *THE NEXT AMERICAN FRONTIER* (1983).

47. See *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), cert. granted, 103 S. Ct. 1249 (1983).

48. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

49. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

50. CENTER FOR THE STUDY OF RESPONSIVE LAW, *QUESTIONS AND ANSWERS ABOUT TRADE PRODUCT STANDARDS: A PRIMER FOR CONSUMERS PREPARED FOR THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY*, 95th Cong., 1st Sess. 1 (1977).

under a single coherent policy. Legal history provides some evidence that this diversity has diminished welfare with wasted technical and industrial resources. Standards have been attacked by Washington enforcement agencies for stabilizing prices, boycotting competitors and retarding new products and process improvements.<sup>51</sup> Perhaps enforcement does not always follow retarded technological progress, but it is a possibility. Why in a trillion-dollar economy do some industries employ standards and others not?

Standards are probably more prevalent in "sunset" industries, approaching the end of their products' life cycles. Standards can slow down the pace of product decay by retarding competitive product alternatives, and by alleging health and safety risks.<sup>52</sup> The collective interests of mature industries, therefore, conflict with the interests of society. Society's more prevalent interests emphasize change and relentless progress seemingly without regard for the cost to industry. Such consequences are attributable to the free market's "creative destruction."<sup>53</sup>

A national public program<sup>54</sup> would not be plagued with conflicts of interests, and could certainly formulate standards using fewer resources than the 400 existing organizations, their redundant staffs and expensive corporate volunteers. Limiting standards to the government is not a new proposal,<sup>55</sup> but it is a sound one. Society only grants monopolies through the government, why not standards? They are, after all, monopolies, with private interests conferring unique privileges on one other, outside public

51. See generally Curran, *supra* note 16.

52. Economist John Blair claims that corporations may eschew technological progress for a variety of reasons, including the "desire to protect the investment in an older technology." J. BLAIR, *ECONOMIC CONCENTRATION* 228 (1972).

53. J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (3rd ed. 1947). Schumpeter stated further, that the most important competition is "the competition from the new commodity, the new technology, the new source of supply, the new type of organization . . . ." *Id.* at 84.

54. The opportunity for antitrust harm was recognized by United States Senator James Abourezk, D-S.D., upon introducing in 1977 a bill to control standards organizations federally:

I do not quarrel with [standards] groups getting together . . . because standards . . . play an important role in a highly technical, industrial society. . . . But, all too often our procedures for setting standards yield precisely the opposite results.

Product standards . . . are unquestionably among today's most convenient modes for restraining trade and deceiving customers.

123 CONG. REC. 5543 (1977).

55. See Turner, *supra* note 15; Curran, *supra* note 16. Ralph Nader also expresses the view that standards are a government function and he therefore believes that government should refrain from giving any support to voluntary standards setting processes. See Curran, *supra* note 16, at 749 n.131. For a criticism of government standards, see Wachtel, *supra* note 29.

scrutiny. So characterized they are illegal, ending their *de facto* Sherman Act exemption. Industry can well prosper by campaigning lawfully and collectively for government standards within existing Supreme Court guidelines.

How sound is this idea? Have not industrial standards produced some salutary results? What about increased health and safety? Under any critical social analysis these results would appear fortuitous at best. Having to accommodate so many diverse self-interests, the present standards-setting process cannot also accommodate the public's interest. Such a process can easily become a coalition either absorbed or isolated by dominant private interests. In *Hydrolevel*, for example, the boiler code was easily manipulated by the conspirators. Predictably, the Court found their egregious conduct illegal. Because they are so susceptible to misuse, the Court did not, however, explain why standards should be legal under the Sherman Act. In fact, some commentators believe all standards are anticompetitive because of their exclusionary and price effects.<sup>56</sup> Other commentators,<sup>57</sup> however, advocate the Court's 1963 *Silver*<sup>58</sup> teachings that standards are legal if used and interpreted through accepted due process procedures. They believe *Silver* protects the interests of society generally, but never question how the public's diverse interests can be protected by procedures ultimately controlled by private interests controlling the organizations as well.

For example, ASME's boiler code effectiveness was disputed by *Hydrolevel* which attributed over 100 major boiler failures in one year to code design flaws and contended its product was a significant technological improvement.<sup>59</sup> This is not surprising, considering the following candid revelation by one conspirator:

A major reason for [our success is a result of our] efforts and skill in influencing the various code making bodies to "legislate" in favor of [our] products. This has been a planned strategy for the business . . . and carried out with considerable success as evidenced by the market penetration of 70 plus %.<sup>60</sup>

If the government were to identify a public course of action, industry could then advise and assist in the formulation and development of a standard—as long as important decisions were not relegated to private decision makers. Since only the government can decide what constitutes a proper

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56. Turner, *supra* note 15; Curran, *supra* note 16.

57. Wachtel, *supra* note 29; Howe & Badger, *supra* note 34.

58. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

59. *Hydrolevel*, 456 U.S. at 571 n.8.

60. *Id.*



and equitable standard, Congress should establish an executive agency—like the Patent Office—to write and certify standards. This would resolve the paradox of standards and their conflict with the antitrust laws and a free enterprise economy.

## VI. CONCLUSION

Since standards-setting organizations play an "important role in the economy"<sup>61</sup> wielding "great power,"<sup>62</sup> the Supreme Court in *Hydrolevel* applied the threat of antitrust treble damages to "deter future violations"<sup>63</sup> by these "extragovernmental agencies."<sup>64</sup> Criticized as an "unprecedented[ed] theory of antitrust liability,"<sup>65</sup> *Hydrolevel* has created substantial problems for the nation's many standards organizations relying on volunteer corporate employees. Since volunteer misconduct cannot be controlled effectively,<sup>66</sup> organizations must develop and interpret standards through their full-time staffs, free of the conflicts plaguing volunteer corporate employees. Organizations must also find alternative funding sources, eliminating the last vestiges of private controlling interests. Since the only other source is public, the character of private organizations will transform. The antitrust risk will then subside, but not dissipate, until standards are either mandated or developed by the federal government. Whatever form organizations eventually take, *Hydrolevel* portends a change for privately devised standards and exposes the myth of the altruistic corporate employee volunteering, but not profiteering, in the public's interest.

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61. *Hydrolevel*, 456 U.S. 556, 577.

62. *Id.* at 570.

63. *Id.* at 575.

64. The Supreme Court in *Hydrolevel* observed: ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Hydrolevel*, 456 U.S. at 570 (quoting *Fashion Originator's Guild of Am., Inc. v. Federal Trade Comm'n*, 312 U.S. 457, 465 (1941)).

65. *Id.* at 578.

66. The Federal Trade Commission recommends a trade regulation rule requiring standards-setting organizations to consider and promptly decide complaints about unreasonable restraints of trade. Presumably, such a rule would have forestalled the *Hydrolevel* "skulduggery," but will not cure the fundamental flaws inherent in standards, as well as in their formulation and development processes, and only underscores the need for more basic reform. See Federal Trade Comm'n, *Standards and Certification*, FINAL STAFF REP. (April 1983).